Mohd Abbas bin Danus Baksan v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J–05–71 OF 2004
GOPAL SRI RAM, MOHD GHAZALI AND JAMES FOONG JJCA
10 JULY 2006

Criminal Law — Murder — Circumstantial evidence — Unsworn statement by the accused — Whether accused's plea of guilt to the charge of rape lent credence to his denial of the killing

Evidence — Circumstantial evidence — Nature of — Legal test to be applied — Time honoured formula 'irresistible conclusion' — Evidence Act 1950 s 8

Evidence — Corroboration — Murder — Conduct of accused — Whether a deliberate lie told by an accused may amount to corroborative evidence against him

Nurul Huda Gani (Nurul) was 10 years old when she died. She was raped and strangled. Initially, the appellant was charged for ravishing her. He pleaded guilty to that charge and was sentenced by the sessions court. Later, he was charged and tried of her murder. The appellant elected to make an unsworn statement where he denied that he had killed her. He placed the blame for the killing on PW23 (a self confessed drug addict) and one 'Jojo' whom he said had accompanied the former. He was convicted and received the mandatory death penalty prescribed by law. He appealed against his conviction for murder. The appellant's main ground of complaint was that the learned judicial commissioner failed to sufficiently appreciate the prosecution's evidence and the appellant's unsworn statement when arriving at his findings. In particular, there was insufficient appreciation by the trial court of the circumstantial evidence relied by the prosecution. Learned counsel for the appellant also submitted that the appellant's plea of guilt to the charge of rape lent credence to his denial of the killing of Nurul.

Held, dismissing the appeal and confirming conviction and sentence:

(1) It is true that the evidence for the prosecution was largely, if not wholly, circumstantial (see para 8). The learned commissioner was very much alive to the fact that the case against the appellant rested on circumstantial evidence. And he used the time honoured formula 'irresistible conclusion' when discussing the legal test to be applied to such evidence (see para 10).

(2) So far as the appreciation of the prosecution's evidence is concerned, we find no merit in the appellant's argument that inferences favourable to the appellant

were not drawn from evidence that admitted of such inferences. The appellant's conduct is relevant and admissible by virtue of s 8 of the Evidence Act 1950. The accused told deliberate lie and it was held that a deliberate lie told by an accused may amount to corroborative evidence against him (see para 11); *Syed Ali bin Syed Abdul Hamid v Public Prosecutor* [1982] 1 MLJ 132 followed.

(3) So far as factual treatment is concerned, it is clear from the judgment under appeal that the learned commissioner went through all the points made in the unsworn statement and found them to be wanting. Some of the matters raised in the unsworn statement were never put to prosecution witnesses. Taking into account all the relevant facts and circumstances of this case, we find no error in the way in which the learned judicial commissioner appreciated the case for the defence that was placed before him (see para 13).

[Bahasa Malaysia summary

Nurul Huda Gani (Nurul) berumur 10 tahun apabila dia mati. Dia diperkosa dan dicekik. Pada mulanya perayu dituduh mencabulinya. Dia mengaku bersalah dan dihukum oleh mahkamah sesyen. Selepas itu dia dituduh dan dibicarakan untuk pembunuhan Nurul. Perayu memilih untuk memberikan pernyataan yang tidak disumpah dimana dia menafikan membunuh Nurul. Dia menyalahkan pembunuhan tersebut pada PW23 (seorang yang mengaku sendiri penagih dadah) dan satu 'Jojo' dimana dikatakannya bersama PW23. Dia disabitkan dan menerima hukuman mati mandatori seperti yang ditetapkan oleh undang-undang. Dia merayu terhadap sabitannya ke atas pembunuhan. Alasan utama perayu ialah bahawa pesuruhjaya kehakiman gagal memberikan perhatian yang secukupnya kepada bukti pendakwaan dan pernyataan perayu yang tidak disumpah ketika mencapai keputusan beliau. Terutama, terdapat perhatian yang tidak mencukupi oleh mahkamah perbicaraan ke atas keterangan ikut keadaan yang digantung oleh pendakwaan. Peguamcara perayu yang bijaksana juga menghujahkan bahawa pengakuan bersalah perayu atas tuduhan perkosa memberikan pembuktian kebenaran penafian pembunuhan Nurul.

Diputuskan, menolak rayuan tersebut dan mengesahkan sabitan dan hukuman tersebut:

(1) Ia adalah benar bahawa bukti pendakwaan kebanyakannya, jika bukan kesemuanya, ikut keadaan (lihat perenggan 8). Pesuruhjaya kehakiman yang bijaksana sangat prihatin atas fakta bahawa kes terhadap perayu bergantung atas bukti ikut keadaan. Dan beliau menggunakan formula yang dihormati iaitu 'kesimpulan yang tidak boleh dielakkan' apabila membincangkan ujian undang-undang yang patut diberikan kepada bukti sedemikian (lihat perenggan 10).

(2) Setakat mana kesedaran kehakiman di atas bukti pendakwaan, kami mendapati tiada merit di atas dakwaan perayu bahawa inferens yang memihak perayu tidak dapat diambil daripada bukti yang memasukkan inferens sebegini. Tingkahlaku perayu adalah relevan dan boleh dimasukkan menurut s 8 Akta Keterangan 1950. Tertuduh sengaja bercakap bohong dan telah diputuskan bahawa pembohongan yang disengajakan mungkin sama seperti keterangan

bersifat menyokong terhadapnya (lihat perenggan 11) *Syed Ali bin Syed Abdul Hamid v Public Prosecutor* [1982] 1 MLJ 132 diikut.

(3) Setakat mana berhubung dengan fakta, adalah jelas daripada penghakiman yang dirayu ini bahawa pesuruhjaya kehakiman yang bijaksana telah meneliti kesemua fakta-fakta yang dibuat dipernyataan yang tidak disumpah dan mendapati ia tidak mencukupi. Terdapat perkara-perkara yang dibangkitkan dipernyataan yang tidak disumpah yang tidak pernah diletakkan kepada saksi pendakwaan. Dalam mengambil kira kesemua fakta-fakta yang relevan dan keadaan kes ini, kami tidak mendapati sebarang kesilapan dalam cara pesuruhjaya kehakiman yang bijaksana memberikan perhatian yang secukupnya kepada pembelaan yang diletakkan kepadanya (lihat perenggan 13).]

Notes

For a case on circumstantial evidence on murder, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) para 1079.

For cases on nature of circumstantial evidence, see 7(1)*Mallal's Digest* (4th Ed, 2003 Reissue) paras 597–598.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209 (refd)
Director of Public Prosecutor v Walker [1974] 1 WLR 1090 refd)
Mohd Affandi bin Abdul Rahman & Anor v PP [1998] 1 MLJ 537 (refd)
Mohamed Salleh v PP [1969] 1 MLJ 104 (refd)
Ng Hoi Cheu v PP [1968] 1 MLJ 53 (refd)
Syed Ali bin Syed Abdul Hamid v PP [1982] 1 MLJ 132 (folld)

Legislation referred to

Evidence Act 1950 s 8

Pritam Singh Brrard (Pritam Singh Brrard & Co) for the appellant.
Abdul Rashid bin Sudin (Mohd Nordin bin Ismail with him) for the prosecution.

Gopal Sri Ram J:

[1] Nurul Huda Gani (Nurul) was 10 years old when she died. She was raped and strangled. Initially, the appellant was charged for ravishing her. He pleaded guilty to that charge and was sentenced by the sessions court. Later, he was charged, tried and convicted of her murder. He received the mandatory death penalty prescribed by law. He appealed against his conviction for murder. We heard his appeal on 3 July 2006. At the conclusion of arguments we dismissed his appeal and confirmed both his conviction and sentence. The reasons for our decision are now produced.

[2] The circumstances in which young Nurul met her have been admirably set out in the judgment of Judicial Commissioner KP Gengadharan Nair (now KP Gengadharan Nair J). All we need to do is to summarise them.

[3] On the morning of 17 January 2004 at about 8.50 am Nurul was sent on an errand by her elder sister, Aien (PW10). She was to go the nearby provision shop to purchase some food items. Nurul went off on her bicycle. But she never returned home. Her journey to and from the shop took her past the Tenaga Nasional Berhad substation where the appellant worked as a security guard. She arrived at the shop. Her errand took no more than a few minutes. But she never returned home. After waiting for a short while, Aien became anxious. She asked a boy to go to the shop to see if Nurul was alright. The boy returned with news that Nurul had come to the shop and then left. A search was organised. As the search party was passing the substation, they noticed the appellant. They stopped and asked him if he had seen Nurul. He replied that he had not. A member of the search party wanted to enter the compound of the substation but the appellant refused him permission. Later, a second request was also refused. The appellant said that only the employer or policemen could enter the compound. Later, with the assistance of two policemen, Peter Andrew Fletcher (PW 9) and Lance Corporal Rusli bin Alias (PW 17) was secured. The appellant then denied the police officers entry unless they obtained permission from the appellant's superior. That permission was obtained. In fact the superior instructed the appellant to permit entry to the police officers. He nevertheless denied the police and the accompanying search party entry into the compound. PW9, PW17 and two others climbed over the 11 foot gate and gained entry. PW 9 after disarming the appellant who was brandishing a parang discovered Nurul's body in the toilet of the guard house occupied by the appellant. She was naked. There was a towel jammed in her mouth. A subsequent post mortem revealed that she had died of manual strangulation.

[4] At the close of the prosecution's case, the learned commissioner found a case to answer and called upon the appellant to enter upon his defence. The appellant elected to make an unsworn statement. In it he denied that he had killed her. He placed the blame for the killing on PW23 (a self confessed drug addict) and one 'Jojo' whom he said had accompanied the former. The learned judge very properly directed himself on the probative value of an unsworn statement by referring to the cases of *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104 and *Ng Hoi Cheu v Public Prosecutor* [1968] 1 MLJ 53. We would, in this context also refer to the *Director of Public Prosecutions v Walker* [1974] 1 WLR 1090, where Lord Salmon, when delivering the advice of the Judicial Committee said (at p 1096):

> Much depends on the particular circumstances of each case. In the present case, for example, even on the approach that everything the respondent said in his unsworn statement was true, no jury (unless perverse) could have acquitted him on the ground of self-defence. There are however cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair

> questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it, that is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves.

[5] Lord Salmon was, of course, dealing with a charge by a judge to a jury. Here the trial was by the learned judicial commissioner sitting alone. That is of no consequence. Because we must treat a direction by a judge of himself in the same way as a direction to a jury, (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209. In the present instance, the learned judicial commissioner, after a careful analysis of the unsworn statement, concluded that it did not raise a reasonable doubt in his mind. He accordingly convicted the appellant.

[6] At the outset of the hearing before us we admitted the record of the proceedings in the sessions court where the appellant had pleaded guilty to the charge of rape. This was at the instance of learned counsel for the appellant (who did not appear at the trial) whose application was not opposed by the learned deputy who responded to the appeal. Learned counsel for the appellant submitted that the appellant's plea of guilty to the charge of rape lent credence to his denial of the killing of Nurul. We will deal with this argument at the appropriate place in this judgment.

[7] Before us the appellant's main ground of complaint was that the learned judicial commissioner failed to sufficiently appreciate the prosecution's evidence and the appellant's unsworn statement when arriving at his findings. In particular, there was insufficient appreciation by the trial court of the circumstantial evidence relied by the prosecution.

[8] Now, it is true that the evidence for the prosecution was largely, if not wholly, circumstantial. And it is learned counsel's complaint that the learned judicial commissioner failed to direct himself that for an accused to be convicted on the basis of circumstantial evidence. With respect, we find no merit in this criticism. In *Mohd Affandi bin Abdul Rahman & Anor v Public Prosecutor* [1998] 1 MLJ 537 this court said (at p 582):

> We do not consider that any particular form of words is necessary to convey to the minds of the jury the burden that lies upon the prosecution when it relies on circumstantial evidence to establish its case. The proposition that circumstantial evidence must, when taken together, irresistibly lead to the conclusion that the accused committed the offence is merely another way of saying that the prosecution must prove its case beyond a reasonable doubt. This is because any gap in the circumstances relied upon or an interpretation of them that reasonably leads to an alternative conclusion inconsistent with guilt would result in the prosecution not having proved its case beyond a reasonable doubt, (see *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306.

[9] In his judgment the learned judicial commissioner said (at p 173):

> I was of the considered view that the matters that I have referred to earlier, taken collectively, in the circumstances constituted a prima facie case against the accused that warranted the calling of the accused's defence to answer the charge against him. The behaviour and conduct of the accused was not, to my mind, consistent with that of a person who had nothing to hide. Thus, I called for the accused's defence after I had reminded myself, and was mindful that there are no eye witnesses and in that sense the evidence against the accused is circumstantial evidence. In my view the cumulative effect of all the evidence led to the irresistible conclusion that it was the accused who committed the crime, see *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195).

[10] There you have it. The learned commissioner was very much alive to the fact that the case against the appellant rested on circumstantial evidence. And he used the time honoured formula 'irresistible conclusion' when discussing the legal test to be applied to such evidence.

[11] So far as the appreciation of the prosecution's evidence is concerned, we find no merit in the appellant's argument that inferences favourable to the appellant were not drawn from evidence that admitted of such inferences. Look at the circumstances again. First, there is the fact that the appellant was alone in the guardhouse when Nurul's body was found. Second, is the fact that Nurul's path to and from the provision store would have led her past the substation at which the appellant was a guard. Third, there is the appellant's conduct which is relevant and admissible by virtue of s 8 of the Evidence Act 1950. That conduct is a matter discussed with care by the learned judicial commissioner. We find two instances of the appellant's conduct to be telling. In the first place, when asked by Aien whether he had seen a little girl (the reference here was clearly to Nurul) pass by he replied that he had not. This was a lie. Not only had he seen her, but, as circumstances unveiled themselves, her dead body was lying in the guardhouse toilet even as the question was asked and answered. We would in relation to this point refer to *Syed Ali bin Syed Abdul Hamid v Public Prosecutor* [1982] 1 MLJ 132 where it was held that a deliberate lie told by an accused may amount to corroborative evidence against him. In that case Salleh Abas LP said (at p 135):

> In other jurisdictions a false statement made by an accused person concerning the surrounding circumstances in which an offence was committed whilst he had an opportunity to commit the offence can be regarded as a corroboration of the evidence against him. *Eade v R* (1924) 34 CLR 154 and also *Regina v Lucas (Ruth)* [1981] 3 WLR 120. We accept the decisions in these cases to be good law. In this case we hold that the representation he made to PW4 regarding the purpose of borrowing the car was a deliberate lie and is therefore a corroborative evidence against him for which he must explain. Such lie is a reflection of his consciousness of guilt as regards the use he intended to make of the car in question.

[12] Next there is evidence that the appellant was most reluctant to let even the police have access into the guardhouse. He repeatedly denied the police and members of the search party access to the guardhouse. Why? The answer is obvious. It must have been to prevent or at least delay the discovery of Nurul's body. That is the irresistible inference to be drawn from his conduct. Then take the appellant's own story. That it was PW23 who committed the murder and the rape. If he knew that

Nurul had been harmed by PW23, the most natural thing for the appellant to have done is to either help the girl or to call for the police to have PW23 apprehended. But he did neither of these things. So, the only fair inference from his conduct is that he wanted to conceal his own crime and not a crime committed by some other person. Against these cold facts, the appellant's plea of guilt to the charge of rape does nothing to weaken the prosecution's case. We accordingly find no merit in the submission that the appellant's plea of guilt to the charge of rape lends credence to his denial of Nurul's killing.

[13] In so far as the appreciation of the appellant's unsworn statement is concerned, we have already discussed earlier the way in which such statements are to be treated as a matter of law. So far as factual treatment is concerned, it is clear from the judgment under appeal that the learned commissioner went through all the points made in the unsworn statement and found them to be wanting. Some of the matters raised in the unsworn statement were never put to prosecution witnesses. That, of course, will have the effect of diminishing the probative value that is to be attached to the unsworn statement. There is also nothing in the unsworn statement to explain the appellant's conduct in seeking to prevent the police from gaining access to the guardhouse. Further, there is no explanation as to why he told a deliberate lie to Nurul's sister Aien. Taking into account all the relevant facts and circumstances of this case, we find no error in the way in which the learned judicial commissioner appreciated the case for the defence that was placed before him.

[14] Having read and re-read the record we are satisfied that the evidence fairly points to the appellant having committed this heinous crime. In our judgment, the case against the appellant had been proved beyond a reasonable doubt. The appeal was accordingly dismissed.

Appeal dismissed.

Reported by Sally Kee